

**A Teterin Engineering (M) Sdn Bhd v Tentera Laut Diraja
Malaysia & Ors**

B HIGH COURT (KUALA LUMPUR) — SUIT NO D-21–58 OF 2006
MAH WENG KWAI JC
29 JUNE 2010

C *Contract — Breach — Supply of goods — Whether time of essence of contract —
Extensions of time for delivery of goods granted to seller — Whether time for delivery
of goods put at large*

D *Evidence — Adverse inference — Failure to call witness — Defendants’ retired
officer having personal knowledge of transaction not called by defendants —
Whether adverse inference ought to be drawn against defendants — Evidence Act
1950 s 114(g)*

E The plaintiff claimed against the defendants for payment in respect of goods it
purchased, sold and/or delivered for the use and/or repair of the defendants’
ship. The goods could generally be classified into three categories. Goods in
F Group A were delivered to the first defendant’s store but were seized by the
Naval Police (‘PROTELA’) on suspicion that the goods were stolen, recycled or
smuggled into the country. The defendants refused to pay for these goods on
the ground that the plaintiff did not follow the proper procedure when
importing the Group A goods thereby causing the seizure of the same. However
these goods were returned to the plaintiff unconditionally some seven years
G after their seizure and the plaintiff was not charged with any offences
pertaining to the goods. In respect of the goods in Group B, the defendants
refused to pay for them on the ground that the goods were delivered late. In
respect of the goods in Group C, the goods were not delivered to the plaintiff
by its supplier since the plaintiff was unable to pay the balance purchase price
for such goods. The supplier had also forfeited the plaintiff’s initial deposit of
H US\$180,000 for such goods. The plaintiff contended that it was unable to pay
the balance purchase price since the defendants had failed to pay for the sale
and purchase of the goods in Group A and B.

I **Held**, allowing the plaintiff’s claim with costs:

- (1) The goods in Group A were imported into Malaysia via Johor Bahru and
the relevant import documents had been approved by an officer of the
first defendant who was duly authorised to approve the same. The import
documents were accepted by the defendants and an end user certificate

issued to the plaintiff exempting it from paying customs duties for the goods ordered by the second defendant. The plaintiff had thus imported the Group A goods into Malaysia via Johor Bahru lawfully and there was no justification for PROTELA to seize them. The plaintiff by delivering the goods in Group A to the first defendant's store at its Naval Base in Lumut had lawfully transferred good title to the Group A goods to the defendants. As such the defendants had no basis to refuse payment for the Group A goods which had been delivered (see paras 17(i)–19).

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- (2) If it was the defendant's case that the import documents relied on by the plaintiff were invalid or unlawful then the defendants ought to have called the relevant officer to explain why he had approved the documents. The defendants failed to do this and as such it was fit and proper for the court to invoke an adverse inference against the defendants pursuant to s 114(g) of the Evidence Act 1950 (see para 24); *Donovan Crawford and others v Financial Institution Services Ltd (Jamaica)* [2005] UKPC 40 followed; *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381 followed; *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509 referred.

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- (3) Although the dates for delivery of the Group B goods were stated in the respective purchase orders, time for the delivery of the same was not made a term of the contract. As such time was not of the essence in the contract. In any event, the goods were available for delivery within a reasonable time in the circumstances. Even if time was of the essence, by granting the plaintiff two extensions of time and by not formally rejecting the plaintiff's request for a third extension, the defendants had put time for the delivery of the Group B goods at large. The defendants had also failed to show that the delay in the delivery of the Group B goods had affected the on-going repairs of the ship. As such the defendants had no basis to cancel the purchase orders, refuse to take delivery of the Group B goods and refuse payment to the plaintiff (see paras 34 & 36); *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151 followed; *Luck v White* (1973) 26 P & CR 89 referred; *Cheah Khooon Tee v Crimson Development S/B (Lamp 1)* [1999] MLJU 108 referred.

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- (4) Since the defendants had failed to pay the plaintiff for the Group A and Group B goods within 30 days of delivery as stated on the reverse of the purchase orders, the defendants ought to be held liable for the inability of the plaintiff to pay for the Group C goods resulting in the forfeiture of the deposit. The defendants were liable to reimburse the plaintiff for the forfeiture of the deposit (see paras 17(iii) & 40).

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[Bahasa Malaysia summary]

Plaintif menuntut terhadap defendan pembayaran berkaitan barangan yang dibeli, dijual dan/atau dihantar untuk kegunaan dan/atau membaiki kapal

- A defendan. Barangan tersebut boleh diklasifikasikan kepada tiga kategori. Barangan dalam Kumpulan A dihantar ke kedai defendan pertama tetapi dirampas oleh Polis Laut ('PROTELA') atas syak wasangka bahawa barangan tersebut dicuri, dikitar semula atau diseludupkan ke dalam negara.
- B Defendan-defendan enggan membayar untuk barangan tersebut atas alasan bahawa plaintif tidak mengikut prosedur yang betul apabila mengimport barangan Kumpulan A oleh itu menyebabkan perampasannya. Walau bagaimanapun barangan ini dikembalikan kepada plaintif tanpa syarat tujuh tahun selepas perampasannya dan plaintif tidak didakwa dengan apa-apa kesalahan berkaitan barangan tersebut. Mengenai barangan di dalam
- C Kumpulan B, defendan-defendan enggan membayar untuk barangan tersebut atas alasan bahawa barangan dihantar lambat. Mengenai barangan di dalam Kumpulan C, barangan tersebut tidak dihantar kepada plaintif oleh pembekalnya memandangkan plaintif tidak dapat membayar baki harga pembelian untuk barangan tersebut. Pembekal juga telah merampas deposit permulaan plaintif sebanyak US\$180,000 untuk barangan tersebut. Plaintif
- D berhujah bahawa ia tidak dapat membayar baki harga belian memandangkan defendan-defendan telah gagal untuk membayar untuk jualan dan belian barangan di dalam Kumpulan A dan B.
- E **Diputuskan**, membenarkan tuntutan plaintif dengan kos:
- (1) Barangan di dalam Kumpulan A diimport ke Malaysia melalui Johor Bahru dan dokumen import yang relevan telah diluluskan oleh pegawai defendan pertama yang diberi kuasa untuk meluluskannya. Dokumen import diterima oleh defendan-defendan dan sijil pengguna akhir
- F dikeluarkan kepada plaintif mengecualikannya daripada membayar duti kastam untuk barangan yang dipesan oleh defendan kedua. Plaintif oleh itu mengimport barangan dalam Kumpulan A ke Malaysia melalui Johor Bahru secara sah dan tidak terdapat justifikasi untuk PROTELA merampas barangan tersebut. Plaintif dengan menghantar barangan
- G dalam Kumpulan A ke kedai defendan pertama di Pangkalan Laut di Lumut telah secara sah menghantar hak barangan terhadap Kumpulan A kepada defendan-defendan. Oleh itu defendan-defendan tidak mempunyai asas untuk enggan membayar barangan Kumpulan A yang telah dihantar (lihat perenggan 17(i)–19).
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- (2) Jika ia adalah kes defendan bahawa dokumen import yang digunakan oleh plaintif tidak sah defendan-defendan patut memanggil pegawai yang relevan untuk menjelaskan mengapa dia meluluskan dokumen-dokumen tersebut. Defendan-defendan gagal untuk berbuat demikian dan oleh itu ia adalah sesuai dan betul untuk mahkamah membangkitkan inferens bertentangan terhadap defendan-defendan
- I berikutan s 114(g) Akta Keterangan 1950 (lihat perenggan 24); *Donovan Crawford and others v Financial Institution Services Ltd (Jamaica)* [2005] UKPC 40 diikuti; *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6

MLJ 751; [2010] 1 CLJ 381 diikuti; *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509 dirujuk.

- (3) Walaupun tarikh-tarikh untuk penghantaran barangan Kumpulan B dinyatakan di dalam pesanan pembelian masing-masing, masa untuk penghantarannya tidak dijadikan terma kontrak tersebut. Oleh itu masa bukan inti pati di dalam kontrak. Walau bagaimanapun, barangan tersebut ada untuk penghantaran dalam masa yang munasabah dalam keadaan ini. Walaupun masa adalah inti pati, dengan memberikan lanjutan masa kepada plaintif dan dengan tidak secara rasmi menolak permohonan plaintif untuk pelanjutan yang ketiga, defendan-defendan telah meletakkan penghantaran barangan Kumpulan B pada keadaan bebas. Defendan-defendan juga gagal untuk menunjukkan bahawa kelewatan dalam penghantaran barangan Kumpulan B telah menjejaskan pembaikan kapal yang sedang dijalankan. Oleh itu defendan-defendan tidak mempunyai asas untuk membatalkan pesanan pembelian, enggan menerima penghantaran barangan Kumpulan B dan enggan membayar plaintif (lihat perenggan 34 & 36); *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151 diikuti; *Luck v White* (1973) 26 P & CR 89 dirujuk; *Cheah Khoon Tee v Crimson Development S/B (Lamp 1)* [1999] MLJU 108 dirujuk.
- (4) Memandangkan defendan-defendan gagal untuk membayar plaintif untuk barangan di dalam Kumpulan A dan Kumpulan B dalam masa 30 hari selepas penghantaran seperti yang dinyatakan di bahagian belakang pesanan pembelian, defendan-defendan patut bertanggungjawab di atas ketidakmampuan plaintif untuk membayar barangan Kumpulan C akibat perampasan deposit tersebut. Defendan-defendan bertanggungjawab untuk membayar balik kepada plaintif untuk perampasan deposit tersebut (lihat perenggan 17(iii) & 40).]

Notes

For cases on failure to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 202–222.

For cases on supply of goods, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2773–2777.

Cases referred to

Cheah Khoon Tee v Crimson Development S/B (Lamp 1) [1999] MLJU 108, HC (refd)

Donovan Crawford and others v Financial Institution Services Ltd (Jamaica) [2005] UKPC 40, PC (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)

- A *Luck v White* (1973) 26 P & CR 89 (refd)
Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151, FC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)

B **Legislation referred to**

Evidence Act 1950 s 114(g)

PK Nathan (T Gunaseelan and Mala Nathan with him) (PK Nathan & Co) for the plaintiff.

- C *Sharifah Hascindie bt Syed Omar (Senior Federal Counsel, Attorney General's Chambers) for the defendant.*

Mah Weng Kwai JC:

- D [1] The plaintiff by its statement of claim dated 3 October 2006 claimed for the total sum of RM1,504,241.38 together with interest and costs against the three defendants in respect of goods sold and purchased for the use and/or repair of the ship known as KD SRI INDERAPURA ('the ship').

- E [2] The goods sold and purchased comprised of, inter alia, spares for circuit breakers, switchboards and other marine parts ('the said goods') that were ordered by the second defendant through the first defendant vide official purchase orders issued to the plaintiff.

- F [3] It was a term of the contract that the said goods were to be supplied and delivered by the plaintiff to the store of the first defendant at its Navy Base in Lumut, Perak.

- G [4] It was also stated in the purchase orders that the said goods were to be delivered by the plaintiff to the first defendant, mostly within a period of four weeks from the dates of the purchase orders (exh P1).

- H [5] Part of the said goods were supplied and delivered to the first defendant but some of the said goods were not.

[6] For ease of reference, the plaintiff's claim in respect of the said goods can be divided into three groups namely:

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| (i) Group A — goods ordered and delivered by the plaintiff to the first defendant's store at Depot Bekalan Armada, Tentera Laut DiRaja Malaysia, Lumut, Perak. | RM357,492.08 |
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(ii) Group B — goods ordered but not delivered to first defendant's store.	RM462,749.30	A
(iii) Group C — goods ordered but not supplied by the supplier in the United States of America. US supplier's forfeiture of the plaintiff's deposit sum of USD180,000 (equivalent to RM684,000)	RM684,000	B
	<u>RM1,504,241.38</u> =====	C

THE PLAINTIFF'S CLAIM FOR GROUP A GOODS

[7] Between 5 December 2000 and 19 December 2000, the second defendant issued purchase orders for Group A goods to the plaintiff. The plaintiff accordingly purchased the Group A goods from its US suppliers. All the Group A goods were delivered on 8 March 2001 to the first defendant's store at its Navy Base in Lumut in accordance with the contract.

[8] The Group A goods were however later seized by the Navy Police known as PROTELA on 14 June 2001 on suspicion that the goods were either stolen, recycled or smuggled into the country without payment of custom duties. The Group A goods were then handed over by PROTELA to the Customs Department for investigations. The Group A goods remained in the custody of the Customs Department until July 2007. As the Group A goods were in the custody of the Customs Department they could not be used in the repair of the ship. The defendants refused to pay the plaintiff for the Group A goods on the ground that the plaintiff did not follow the proper procedure when importing the Group A goods thereby causing the seizure of the same by PROTELA and which were then handed to the Customs Department for further investigations.

[9] The plaintiff contended that the seizure of the Group A goods by PROTELA was unjustified as the goods were neither stolen, recycled nor smuggled into the country.

[10] Sometime in mid July 2007, almost seven years after the Group A goods were seized, the Customs Department contacted the plaintiff to collect the said Group A goods as they were being returned unconditionally to the plaintiff. The plaintiff was not required to pay the custom duties (estimated to be in the sum of RM108,086.18) nor was the plaintiff required to pay any compound to the Customs Department. Importantly, the plaintiff and/or its directors were not charged for any offence under the Customs Act 1967.

A THE PLAINTIFF'S CLAIM FOR GROUP B GOODS

B [11] The Group B goods were also ordered by the second defendant from 5 December 2000 to 19 December 2000. The Group B goods were to be delivered by the plaintiff to the first defendant's store at its Navy Base in Lumut, mostly within the period of four weeks, from the dates stated in the purchase orders that is, between 4 January 2001 and 11 January 2001. The plaintiff was unable to deliver the Group B goods on or before 11 January 2001. The plaintiff had been informed by its US suppliers that there were delays in the delivery of the Group B goods due to bad weather conditions (typhoon) in the United States of America. The plaintiff accordingly applied to the defendants for an extension of time for the delivery of the Group B goods. The defendants allowed the plaintiff's application twice by extending the time for delivery to 20 January 2001 and subsequently to 20 February 2001. When the plaintiff on 27 February 2001 requested for a further extension of time to 20 March 2001, the defendants did not respond to the plaintiff. The Group B goods eventually arrived in Malaysia on or about 15 March 2001. The defendants refused to pay for the Group B goods as they had arrived after the extended deadline of 20 February 2001. The plaintiff contended that time was not of the essence of the contract and in any event the defendants by allowing the two extensions of time had put time at large. As the defendants refused to take delivery of the Group B goods, they remained in the possession of the plaintiff.

F THE PLAINTIFF'S CLAIM FOR GROUP C GOODS

G [12] Upon the second defendant placing purchase orders for the Group C goods sometime after 25 December 2000, the plaintiff placed the orders with their US suppliers (see US suppliers' invoice at exh P4). On or about 3 May 2001 the plaintiff paid the sum of USD180,000 (equivalent to RM684,000) to the US suppliers as deposit for the Group C goods. The US suppliers informed the plaintiff that the deposit sum would be forfeited if the balance was not paid by 24 February 2003 (exh P26). Unfortunately as the plaintiff was unable to pay the balance for the Group C goods, the contract was terminated by the US suppliers and the deposit sum was forfeited.

I [13] The defendants refused to pay the plaintiff for the Group C goods as they were not delivered at all. The plaintiff contended that the Group C goods were never delivered to Malaysia by the US suppliers as they had failed to pay the balance price for the Group C goods. The plaintiff claimed that they were unable to pay the balance of the purchase price for the Group C goods as the defendants had failed to make the necessary payments for the sale and purchase of the Group A and Group B goods.

ISSUES TO BE DETERMINED BY THE COURT

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Group A goods

[14] Whether the defendants are justified in refusing to pay for the Group A goods which had been delivered to the first defendant's store at its Navy Base in Lumut on 8 March 2001 on the ground that the Group A goods were later seized by PROTELA and whether such seizure was due to the fault of the plaintiff when importing the Group A goods.

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Group B goods

[15] Whether the defendants are justified in refusing to accept delivery of the Group B goods on the ground that they only arrived on or about 15 March 2001 that is, after the extended deadline of 20 February 2001 and whether time was the essence of the contract.

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Group C goods

[16] Whether the defendants are liable to pay the deposit sum which was forfeited by the US suppliers as the defendants had failed to pay for the Group A and Group B goods.

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FINDINGS OF THE COURT

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[17] Upon hearing the evidence of the three witnesses in the plaintiff's case and the six witnesses in the defendants' case and upon a consideration of the documentary exhibits tendered during the trial, I held that the plaintiff had proven its case on a balance of probabilities in its claim for the total sum of RM1,504,241.38 in respect of the three groups of goods.

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(i) Group A goods

I held that the plaintiff had imported the Group A goods into Malaysia via Johor Bahru lawfully and that there was no justification for PROTELA to seize them. As such the defendants had no basis to refuse payment for the Group A goods which had been delivered to the first defendant's store at its Navy Base in Lumut on 8 March 2001.

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(ii) Group B goods

I held that time was not of the essence in the contract and as such the defendants had no basis to refuse to take delivery of the Group B goods by reason of their late arrival and to cancel the purchase orders.

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A (iii) Group C goods

I held that the defendants are liable to reimburse the plaintiff for the forfeiture of the deposit sum by the US suppliers in respect of Group C goods as the defendants had failed to pay for the Group A and Group B goods.

B REASONS FOR THE FINDINGS OF THE COURT

Group A goods

- C [18] PW2, Ahaideen bin Kameron testified that the Group A goods were imported into Malaysia via Johor Bahru. The relevant import documents had been approved by Lt Kmdr Shandra Das, an officer of the first defendant who was duly authorised to approve the same. The import documents (exh P11) were accepted by the defendants. In fact an end user certificate dated 9
- D December 2000, (exh P6) had been issued in favour of the plaintiff. This certificate exempted the plaintiff from paying custom duties for the Group A goods ordered by the second defendant. P6 was approved notwithstanding that there was a clerical mistake on the import documents when PW2's clerk had affixed the chop bearing the name of a company known as MTU Services Sdn
- E Bhd instead of the plaintiff's name on the said import documents.

- F [19] As the Group A goods were lawfully imported there was no basis whatsoever for PROTELA to suspect that the Group A goods were either stolen, recycled or smuggled into the country. To explain to and to reassure the first defendant that the Group A goods were genuine goods lawfully imported from the United States of America, a representative of the plaintiff's US suppliers, Mr Sean Wong of DS Electronics, USA personally visited the first defendant's store at its Navy Base in Lumut to inspect the said Group A goods in the presence of the first defendant's personnel. Mr Wong was satisfied that
- G the Group A goods delivered to the first defendant were genuine goods supplied by DS Electronics, USA as the parts bore the mark of 'NATO' on them thus evidencing that the parts were authentic. Despite the assurance given by the US suppliers to the first defendant and to PROTELA, PROTELA
- H proceeded to seize the Group A goods and thereafter forwarded them to the Customs Department.

- I [20] The plaintiff had by its letter dated 20 April 2002 (exh P25) requested the defendants to issue a letter of confirmation if the Group A goods were still required and if they were not, the plaintiff requested the defendants to issue a certification of rejection, so that the Group A goods could be returned to the US suppliers. (See also P7 and P8 where the plaintiff had requested the defendants to release the Group A goods). The defendants did not reply the plaintiff's letter of request.

[21] The Customs Department after detaining the Group A goods for almost seven years suddenly contacted the plaintiff in mid July 2007 to collect the Group A goods. The plaintiff did not collect the Group A goods as they were of no use to them by then. The Customs Department by releasing the goods unconditionally that is, without requiring the plaintiff to pay any custom duties or a compound or without charging the plaintiff and/or any of the directors of the plaintiff for any offence under the Customs Act for evasion of custom duties or for false declaration of the Group A goods simply meant that the seizure of the goods by PROTELA was not justified at all in the first place.

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[22] In any event the defendants had failed to plead in their defence the grounds for the seizure of the Group A goods by PROTELA besides merely stating in para 4.1 of the defence that the said goods were in the custody of the Customs Department for investigations.

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[23] Further no evidence was adduced by the defendants to prove that the Group A goods were lawfully seized by PROTELA by reason of improper or invalid import documents used by the plaintiff. Also no evidence has been adduced by the defendants to support PROTELA's initial suspicions that the Group A goods may have been stolen or recycled.

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[24] If it was the defendants' case that the import documents relied on by the plaintiff were invalid or unlawful then the defendants ought to have called Lt Kmdr Shandra Das as a witness to explain why he had approved the documents. This the defendants did not do and as such this was a fit and proper case for the court to invoke an adverse inference against the defendants pursuant to s 114(g) of the Evidence Act 1950.

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[25] In the case of *Donovan Crawford and others v Financial Institution Services Ltd (Jamaica)* [2005] UKPC 40, Lord Waller of Gestingthorpe when delivering the advice of the Privy Council said:

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It is well settled that in civil proceedings the court *may* draw *adverse* inferences from a defendant's decision not to give or call evidence as to matters within the knowledge of himself or his employees.

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[26] And in the recent Federal Court decision in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381 Gopal Sri Ram FCJ held that where the first respondent being a party to the action did not provide reasons as to why she did not care to give evidence, the court will normally draw an adverse inference.

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A [27] Gopal Sri Ram FCJ when delivering the judgment of the court quoted from a number of authorities including the passage from the judgment of Peh Swee Chin FCJ in *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509:

B The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it.

C [28] In the present case, Lt Kmdr Shandra Das was the officer who had approved the import documents. He had personal knowledge of the transaction and would have been the best witness to explain to the court the meaning and purport of the end user certificate (exh P6) and the import documents (exh P11). He is a retiree and being a government pensioner, the defendants would have had no difficulties to locate his whereabouts and to call him as a witness. Unfortunately nothing was said by the defendants on the whereabouts or availability of Lt Kmdr Shandra Das or any explanation given to account for the absence of the officer as a witness.

E [29] The defendants would be in peril of not having the evidence of an important witness and of having an adverse inference drawn against them.

F [30] DW2 and DW6 in their evidence informed the court that disciplinary action had been taken against officers of the first defendant in respect of the supply of goods for the use and repair of the ship. This was informed by PROTELA to the Customs Department by letter dated 2 December 2003 (exh P12) that action had been taken against those officers concerned.

G [31] Surprisingly, in spite of the seizure of the Group A goods by PROTELA, no police report was lodged by the defendants.

H [32] Lastly, as the Group A goods were lawfully imported, were not stolen or recycled goods, the plaintiff by delivering the same to the first defendant's store at its Navy Base in Lumut had lawfully transferred good title to the Group A goods to the defendants and the defendants ought to pay for them.

I *Group B goods*

[33] The Group B goods were ordered by the defendants from 5 December 2000 to 19 December 2000. The time period for the delivery of the Group B

goods was stated in the purchase orders (exh P1). The plaintiff was to deliver the Group B goods to the first defendant's store at its Navy Base in Lumut from 4 January 2001 to 11 January 2001.

A

[34] I am of the view that although the dates for delivery of the Group B goods were stated in the purchase orders, time for the delivery of the same was not made a term of the contract and time as such was not of the essence. I am of this view because on the reverse of the purchase orders under 'Peringatan (Untuk Pemborong)' at para 2, it is stated that:

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2. Pesanan ini *mungkin* dibatalkan jika barang-barang tempahan tidak disampaikan pada tarikh yang ditetapkan.

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This meant that in the event of late delivery of the Group B goods, the defendants had the discretion (*mungkin*) to cancel the purchase orders. It did not mean that it was a term of the contract that in the event of late delivery the purchase orders *shall* be cancelled.

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In the case of *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151 Salleh Abas FJ (as he then was) when delivering the judgment of the Federal Court held that in the modern law of contract *prima facie* a stipulation as to time is not of the essence of a contract, unless the parties agree that it be so. Here, there was no evidence whatsoever to even suggest that the parties had considered time to be of the essence.

E

[35] Notwithstanding that time was not of the essence, it did not mean however that the plaintiff had unlimited time to effect delivery. The plaintiff still had to deliver the Group B goods within a reasonable time. As the Group B goods arrived on or about 15 March 2001 it can be said that the goods were available for delivery within a reasonable time in the circumstances.

F

[36] Alternatively, if it is held that time was of the essence of the contract for the delivery of the Group B goods, I am of the view that time had been put at large by the defendants by virtue of the following circumstances:

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- (a) the dates for delivery of the Group B goods were from 4 January 2001 to 11 January 2001.
- (b) the defendants allowed the plaintiff an extension of time for delivery up to 20 January 2001 (the first extension of time). Although no letter of request by the plaintiff or letter of approval by the defendants was tendered in evidence, it is not disputed that time was in fact extended to 20 January 2001 (see answer 51 in the witness statement of PW1).
- (c) By 11 January 2001 the plaintiff was informed by its US suppliers that due to extreme bad weather in the United States of America at that time, the delivery of the Group B goods could only be completed by mid

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- A** February 2001 (exh P17). Accordingly the plaintiff applied for another extension of time to deliver the Group B goods. Again, although no letter of request by the plaintiff or letter of approval by the defendants was tendered in evidence, it is not disputed that time was extended up to 20 February 2001 (the second extension of time) (see exh P19 para 1 and the
- B** evidence of PW1 in further cross-examination at p 12 of the notes of evidence).
- C** (d) As the US suppliers still could not deliver the Group B goods to Malaysia towards the end of February 2001, the plaintiff on 27 February 2001 applied to the defendants for yet another extension of time to 20 March 2001 (exh P19) (the third extension of time). The plaintiff handed to the defendants copies of letters from the US suppliers as evidence of bad weather (exhs P20–P23). However the defendants did not reply to the plaintiff.
- D** The defendants not only did not issue any letter to the plaintiff formally rejecting their request for the third extension of time, but importantly, the defendants did not inform the plaintiff after allowing the first and second extensions of time, that they would be making time the essence of the contract. The defendants did not give any new date line to the plaintiff to deliver the Group B goods.
- E** (e) The Group B goods eventually arrived in Malaysia on or about 15 March 2001. It appears that the defendants subsequently cancelled the purchase orders for the Group B goods on the ground of late delivery but there appears to be no evidence tendered in court on the exact date of the
- F** cancellation. However, what we do know is that the plaintiff by their letter dated 6 August 2001 (exh P21) in para 5 appealed to the defendants to reconsider the cancellation of the purchase orders. The defendants did not reconsider this decision to cancel the purchase orders.
- G** (f) I am of the view that having granted the first and second extensions of time to the plaintiff and without formally rejecting the plaintiff's request for the third extension of time, the defendants had put time for the delivery of the Group B goods at large. By so doing the defendants had therefore no basis to cancel the purchase orders by reason of late delivery and to refuse payment to the plaintiff.
- H** (g) The defendants primarily contended that despite the first and second extensions of time granted, the plaintiff had failed to fulfill its obligations and deliver the Group B goods within the stipulated extension of time ie on or before 20 February 2001.
- I** The plaintiff on the other hand contended that time had been set at large by the defendants through their conduct and/or by operation of law.

- (h) In determining whether the defendants could lawfully refuse to accept delivery of the Group B goods the central issue to be determined by the court was whether time had been set at large by the conduct of the defendants. A

In the case of *Luck v White* (1973) 26 P & CR 89 it was held that: B

If the party who is in the right allows the defaulting party to try to remedy his default after an essential date has passed, he cannot then call the bargain off without first warning the defaulting party by fixing a fresh limit, reasonable in the circumstances.

- (i) In the present case, the defendants had allowed the plaintiff to try to remedy their default twice after the first delivery dates had passed. There was a need to give a warning by the defendants to the plaintiff by fixing a fresh time limit, reasonable in the circumstances, for the delivery before the defendants could cancel the purchase orders. The defendants cannot call the bargain off without first warning the plaintiff. C
D

- (j) In the case of *Cheah Khoon Tee v Crimson Development S/B (Lamp. 1)* [1999] MLJU 108, Steve Shim J (as he then was) cited with approval the following passage taken from Pollock and Mulla on the *Indian Contract and Specific Relief Acts* (11th Ed, 1994) at p 578 which reads: E

In the notice making time the essence of the contract the party can be intimated that in default of compliance with the requisition the contract will be treated as cancelled.

Further in the case of *Sim Chio Huat v Wong Ted Fui* the Federal Court held: F

However, the rules contained in s 56 of the Contracts Act are not different from the position arrived at in common law. *Yeow Kim Pong Realty Ltd v Ng Kim Pong* [1962] MLJ 118 at p 126. The position is this: if in a contract in which time is of the essence, a party fails to perform it by the stipulated time, the innocent party has the right either to rescind the contract, or to treat it as still subsisting. If he treats it either expressly or by conduct as still continuing, the contract exists but time ceases to be of the essence and becomes at large. Consequently he cannot claim the liquidated damages under the contract unless there is a provision as to the extension of time. However, this cessation can be revived and so time can be restored to be of the essence by the innocent party serving a notice to the party in default giving a new date of completion (see Hudson, pp 604 & 612). G
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- (k) In the present case I am of the view that the defendants did not expressly or by conduct cancel the purchase orders and rescind the contract after 20 February 2001 as there was no evidence tendered in court to that effect. The contract therefore continued to exist but time ceased to be of the essence and became at large. However the defendants could have revived the cessation and restored time to be of the essence by serving a notice on the plaintiff giving a new date of delivery coupled with a notice of termination in the event of any further delay. I

A (l) In any event taking the date 20 February 2001 to be the last date for the delivery of the Group B goods, the delay in the delivery was only about three weeks, the Group B goods having arrived on or about 15 March 2001. Hence the delay was not inordinate and the defendants ought not to have exercised their discretion, albeit provided for on the reverse of the purchase orders, to cancel them.

B (m) It will also be noted that the Group A goods were to be delivered to the first defendant from 2 January 2001 to 17 January 2001. However they were only delivered on 8 March 2001, after a delay of about seven weeks yet the defendants did not object to the late delivery of the Group A goods and did not cancel those purchase orders.

C (n) Further at all material times, the ship was being repaired from 2 February 2000 and the repairs were only completed on 22 October 2001. The overall completion of the repairs of the ship was on 27 November 2001. D It can be seen thus that when the Group B goods arrived on or about 15 March 2001, the ship was still in the process of being repaired. The defendants had failed to show that the delay in the delivery of the Group B goods had affected the on-going repairs of the ship.

E *Group C goods*

[37] The plaintiff, after having paid the deposit of USD180,000 (equivalent to RM684,000) vide invoice AH000142 (exh P4) on or before 3 May 2001 to the US suppliers, did not pay the balance of the purchase price. In evidence F PW1 had stated that payment (of the balance purchase price) must be made first before the US suppliers would despatch the goods. As the balance purchase price was not paid, the Group C goods were not supplied by the US suppliers to the plaintiff. Instead the deposit sum was forfeited by the US suppliers on or about 24 February 2003 (exh P26).

G [38] The defendants had merely in para 4.2 of their defence stated that the purchase orders for the Group C goods were cancelled as the plaintiff had failed to deliver the goods within time.

H [39] No evidence whatsoever was adduced from the defence witnesses to dispute the plaintiff's claim for reimbursement of the deposit forfeited. Additionally, it will be noted that counsel for the defendants in her submission did not even rebut the plaintiff's claim for the Group C goods at all.

I [40] I am of the view that as the defendants had failed to pay the plaintiff for the Group A and Group B goods within 30 days of delivery as stated on the reverse of the purchase orders, the defendants ought to be held liable for the inability of the plaintiff to pay for the Group C goods resulting in the forfeiture

of the deposit sum on or about 24 February 2003.

A

THE DEFENDANTS' SUBMISSION

[41] Counsel for the defendants submitted that in respect of the Group B goods the plaintiff had failed to plead force majeure in the statement of claim to explain for the delay in the arrival of the Group B goods and thus could not rely on the reason of extreme bad weather. While force majeure may not have been pleaded, the plaintiff's witnesses did adduce evidence of extreme bad weather to account for the delay in the delivery, to which counsel for the defendants did not object. Further, the defence did not even challenge the plaintiff's witnesses on the extent of the alleged extreme bad weather that had caused the delay in the delivery of the Group B goods.

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[42] The court found it difficult to understand and to accept the contention of the counsel for the defendants that had the plaintiff paid the compound to the Customs Department the Group A goods would have been returned, when there was no evidence whatsoever that the Customs Department had offered the plaintiff to compound any offence. Counsel for the defendants also submitted that if the Group A goods were not returned by the Customs Department then the Customs Department and not the first defendant would be responsible to the plaintiff. It is even more difficult for the court to accept the submission of counsel for the defendants that as the plaintiff had failed to pay the compound for almost seven years thus, the Group A goods had not been returned, when as mentioned earlier there was absolutely no evidence adduced at all to show that the Customs Department had offered the plaintiff to have the case compounded.

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[43] The alternative submission by counsel for the defendants that the third defendant cannot be held liable as the primary tortfeasor and therefore cannot be held vicariously liable for the first and second defendants for negligence is to say the least, surprising. Counsel's further submission that the plaintiff should have sued the Customs Department as the tortfeasor and not the defendants was even more alarming. Counsel for the defendants has obviously forgotten or misunderstood that the plaintiff's case against the defendants was for breaches of contract and not for negligence. In any event, the defendants had not pleaded in the defence that the Customs Department ought to have been sued instead of the defendants.

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[44] By reason of the above, I held that there were no merits in the defendants' case and that the plaintiff had proved its case on a balance of probabilities. As the plaintiff had withdrawn its claim against the first

A defendant just before judgment, I accordingly allowed the plaintiff's claim together with interests and costs against the second and third defendants.

Plaintiff's claim allowed with costs.

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Reported by Andrew Christopher Simon

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